

## APPELLATE COURT OPENS THE DOOR TO HARASSMENT CLAIMS BY EMPLOYEES INCORRECTLY PERCEIVED AS BELONGING TO A PROTECTED CLASS

By *Harris Neal Feldman and Joseph J. Langkamer*

In an expansion of New Jersey law that creates an entirely new arena of claims against employers, the Appellate Division recently ruled that an employee may pursue a hostile work environment lawsuit against his employer based on religious slurs directed at the employee because of the employer's misperception that the employee was Jewish. *Cowher v. Carson & Roberts*, No. 4014-10T1, 2012 N.J. Super. LEXIS 55 (App. Div. 2012). Given this expansion of the law, employers must: (1) address this new "perceived as" protection with their Human Resources professionals and all managers and supervisors; (2) update their anti-discrimination/harassment policies; and (3) look for further legal developments. This Alert reviews the facts leading to the appellate ruling and offers immediate guidance for employers.

### ***Cowher v. Carson & Roberts***

Carson & Roberts employed Myron Cowher as a truck driver from April 2006 to May 2008. After leaving his job due to a disability, Cowher claimed that for over a year his supervisors continually had directed explicit anti-Semitic slurs towards him because they believed he was Jewish. These slurs included calling Cowher a "Jew Bag" and a "Jew Bastard" and saying: "if you were a German, we would burn you in the oven." Cowher claimed that supervisors made these types of comments on a daily basis and in front of people coming to service the company equipment and delivery persons. Cowher, however, was not Jewish.

Cowher reported these comments to another supervisor, who told him to "ignore it" and it would go away. Cowher also attempted to speak with the company president, who instructed him to make an appointment. Cowher left the company before doing so and later filed suit.

The trial court dismissed Cowher's lawsuit, holding that the anti-Semitic slurs were not actionable in this case because there is no cause of action premised upon *perceived* membership in a protected group other than disabled persons.

The Appellate Division disagreed. In an expansive reading of New Jersey's Law Against Discrimination ("LAD"), the court held that if Cowher "can demonstrate that the discrimination that he claims to have experienced would not have occurred but for the perception that he was Jewish, his claim is covered by the LAD." The Court acknowledged that, traditionally, the law permitted a plaintiff to bring a "perception" claim only where the employer perceived that the employee had a disability, as opposed to the other protected grounds under the LAD, including religion. The Court, however, saw no justification for limiting the LAD in this fashion, reasoning that: "[T]here is no reasoned basis to hold that the LAD protects those who are perceived to be members of one class of persons enumerated by the Act and does not protect those who are perceived to be members of a different class, to which the LAD offers its protections in equal measure."

The Court further stated that the proper inquiry to determine the offensiveness of the comments was the effect of the derogatory comments on a reasonable Jew, rather than on a reasonable person of the employee's actual background." Viewed under this standard, the Court concluded that the comments "are undeniably actionable" under the law, finding that the supervisors who made the comments were motivated by their belief that plaintiff was Jewish, and thus engaged in *real* discrimination and harassment of the kind that the LAD seeks to eliminate. Accordingly, Cowher's case was returned to the trial court for further deliberation.

### **Implications for Employers**

Given this expansion of the law, employers need to address "perceived as" discrimination in their policies and practices, including:

- **Update Trainings.** What employees may think is a

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“locker-room type exchange” (as in *Cowher*) may have severe implications. Thus, employers should work with their Human Resources departments and legal counsel to diligently update trainings and written policies relating to anti-discrimination and workplace harassment based on new potential causes of action under the LAD.

- **Advise Supervisors and Managers.** In *Cowher*, the plaintiff reported the derogatory comments to another supervisor and attempted to report it to the president of the company, but they did not stop the alleged harassment. *Cowher* serves as an important reminder that management-level employees must take any claims of discriminatory acts seriously. Employers need to explain to managers that their employees may now bring claims based on being “perceived as” a protected class, so any discriminatory statements made in the workplace may be actionable.
- **Review and Revise Electronic Communications and Social Media Policies.** While such communications were not alleged in *Cowher*, they present the same challenges in a more-difficult-to-monitor format. In any event, employers also should review such policies in light of recent decisions and guidance from the National Labor Relations Board (“NLRB”).
- **Pay Attention to Legal Developments.** *Cowher* may very well be reviewed by the New Jersey Supreme Court, which could lead to a narrower ruling, a tougher legal standard, or an affirmation of the Appellate Division’s ruling. Meanwhile, other courts in New Jersey could address the same or similar issues with differing

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results. As with *Cowher*, such decisions may immediately change the way employers need to respond to employee complaints of discrimination and harassment. ♦

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*For more information about Schnader’s Labor and Employment Practices Group or to speak with a member of the Firm at a particular Schnader office location, please contact:*

*Scott J. Wenner, Chair*  
212-973-8115; 415-364-6705  
[swenner@schnader.com](mailto:swenner@schnader.com)

*Michael J. Wietrzychowski, Vice-Chair*  
856-482-5723; 215-751-2823  
[mwietrzychowski@schnader.com](mailto:mwietrzychowski@schnader.com)

*Harris Neal Feldman*  
856-482-5734  
[hfeldman@schnader.com](mailto:hfeldman@schnader.com)

*Joseph J. Langkamer*  
215-751-2834  
[jlangkamer@schnader.com](mailto:jlangkamer@schnader.com)

[www.schnader.com](http://www.schnader.com)  
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